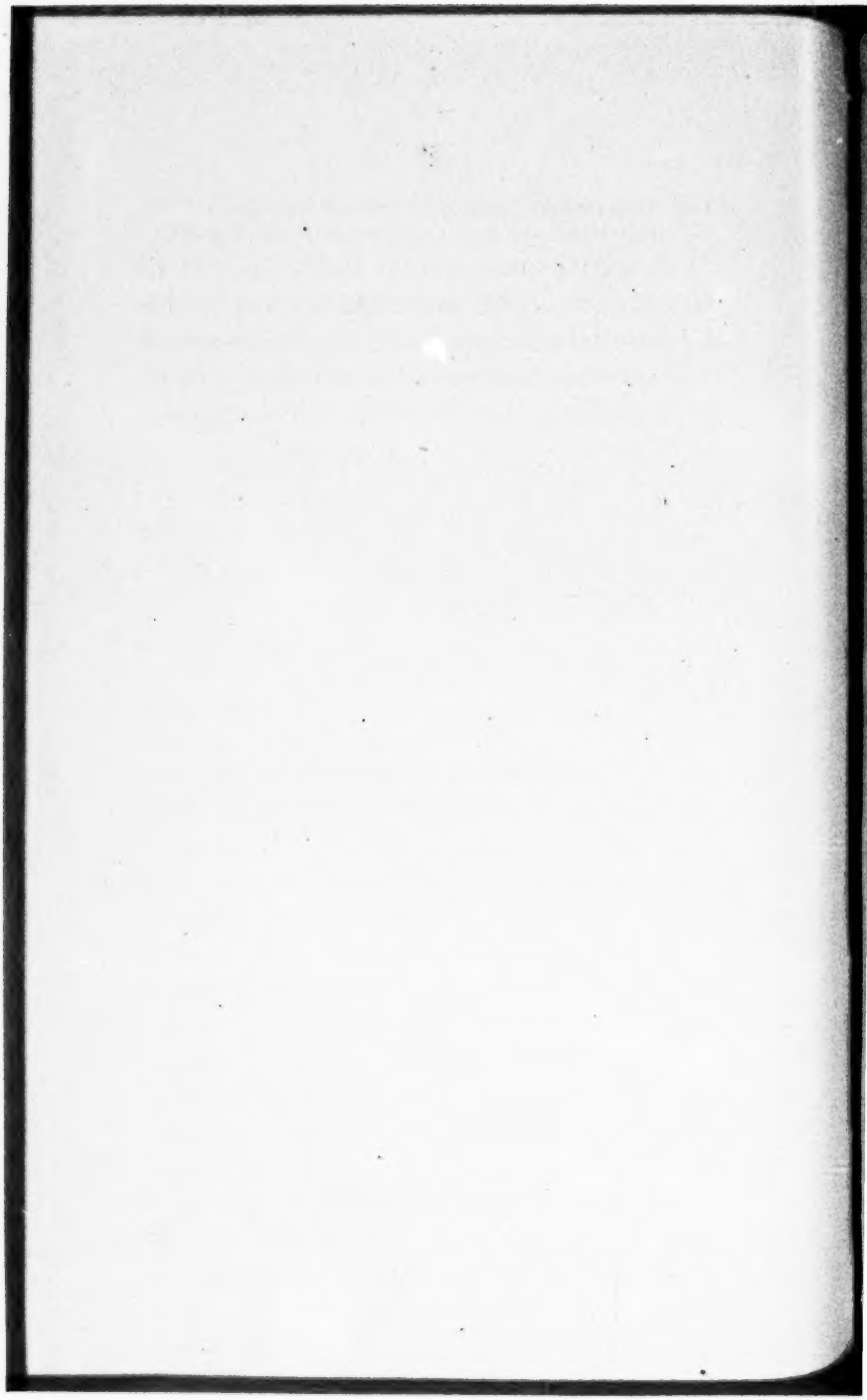

No. 277.

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JAMES H. McKENNEY,
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Br. & Br. for P. E. (on mo.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 277.

Filed April 28, 1900.

LOUISA BANHOLZER,

Plaintiff in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF OF COUNSEL IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM.

CHRISTOPHER DILLON O'BRIEN,
Plaintiff's Attorney.

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(17,386)

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Defendant in error has moved to dismiss the writ of error in this case or to affirm the judgment of the supreme court of the State of Minnesota. The motion to dismiss is based upon the alleged ground that this court has no jurisdiction to review the

judgment of the supreme court of the State of Minnesota. The motion to affirm is based upon the alleged ground, that if the record shows that this court has jurisdiction it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

The statement of facts made in defendant's brief upon this motion embraces several matters not at all pertinent to the question raised on the motion and omits certain facts which we deem to be pertinent, namely: that after the appeal from the order of the district court of Ramsey County denying plaintiff's motion for a new trial had been determined by the supreme court of Minnesota and the case remanded to the district court, and judgment entered in the latter court, an appeal to the supreme court from the judgment of the district court was taken conformably to the statutes and rules of practice of the courts of the State of Minnesota; that upon this appeal plaintiff assigned as error that the lower court in its proceedings and judgment denied to the public act of the state of New York set up in the plaintiff's complaint and admitted by defendant's answer, that faith and credit it was entitled to by virtue of the Constitution of the United States; and that the judgment of the supreme court rendered upon this appeal is the final determination of the case in the highest court of the State of Minnesota, which is here for review upon the writ of error issued out of this court.

As to that part of the brief of counsel for de-

fendant in error on this motion which may be designed to support the motion to affirm, we do not desire to make any special reply. We may be allowed, however, to remark that if the question we present to this court upon this appeal is so frivolous as not to need argument, then have we indeed gone astray in our understanding of the facts of this case, the constitution and statutes of the United States relevant thereto, and the decisions of this court, a considerable number of which we have examined, cited and quoted from in our brief upon the merits, and others of which we will cite in this brief. We require nothing more to relieve us of this unjustifiable charge of frivolity than a fair consideration of our case as the same appears in the record and shall be presented to this court.

The argument of counsel for the defendant in error in their brief upon this motion is altogether upon the merits of the case and hence entirely irrelevant to the question presented on this motion, with the exception of the last paragraph but one where are cited the cases of Glenn v. Garth, and Lloyd v. Matthews. We are satisfied, and believe the court will be so, that to suppose this case barred out of this court by the rule of those cases is completely to misconceive the situation which is here presented.

I.

THE LOWER COURT WAS NOT CALLED UPON TO CONSTRUE NOR WARRANTED IN CONSTRUING THE PUBLIC ACT OF THE STATE OF NEW YORK, BUT WAS CALLED UPON AND BOUND UNDER THE CONSTITUTION AND STATUTES OF THE UNITED STATES TO APPLY THAT ACT TO AND GIVE IT VALIDITY, CREDIT AND EFFECT IN THE DETERMINATION OF THE CASE AT BAR.

Johnson v. H. R. R. Co., 49 N. Y. 456.
Sturges v. Crowningshield, 4 Wheat. (U. S.) 202.
McCluskey v. Cromwell, 11 N. Y. 593.
Ruggles v. Illinois, 108 U. S. 526-534.
Wilkinson v. Leeland, 2 Pet. 627-662.
Doe v. Considine, 6 Wall. 458-479-480.
Amy v. Watertown, 130 U. S. 320-323-324.
McPherson v. Blacker, 146 U. S. 1-27.

As has already been set forth in our brief upon the merits the transactions between Mr. Banholzer and the defendant in error, which took place between September, 1896, and the time of his death, were such that under and by virtue of a valid and mutually enforceable contract made between them while the policy of Mr. Banholzer was in force, there was due, first on the 16th of March, 1897, and then again on the 16th of May of the same year, an installment or portion of a premium required by the terms of his policy to be paid. These installments or portions of premiums were a part of the

premium provided by the terms of the original contract of insurance to be paid on the 16th day of September, 1896, or within the month of grace thereafter allowed by the policy. But Mr. Banholzer desiring further time as to a part of that sum, which was $1146, before the expiration of that month of grace, paid the company $286 in cash and was granted an extension of six months' time to pay the balance of his premium. At the end of six months he paid $241.50 in cash and was granted a further extension of sixty days' time to pay the balance. In consideration of this extension the company exacted from Mr. Banholzer his promissory note for the amount of the deferred payment, and injected into this note a provision for the forfeiture of the policy in case of failure in payment of the note. It has long gone beyond the region of dispute that these transactions taken as a whole amounted to nothing else than a modification of the original contract of insurance in this respect, that, instead of being required to pay a premium of $1146 on the 16th of September, he was to and did pay $286 in cash at that time, and $241.59 on the 16th of March following, and on the 16th of May, 1897, was to pay the remaining portion of his premium. In consideration of this modification of the policy as originally made, Mr. Banholzer paid 5 per cent interest on the unpaid portion of the premium during the extended period, and agreed further that the provisions in the policy relating to forfeiture for non-payment of premium should apply to that portion of the premium, the time for

payment of which had been extended. Accordingly there was due on the 16th day of May, 1897, a portion or installment of a premium required by the terms of Mr. Banholzer's policy to be paid. That this was the true situation and only tenable view to hold with reference to those transactions and the relations between Mr. Banholzer and the defendant we believe to be beyond dispute. No other view of the matter has even been held by any of the judges of the lower courts who have examined this case, nor even by counsel for the defendant until a late stage in the proceedings, when they discovered the consequences to which it inevitably leads. The same view was taken by the court of appeals of the state of New York, in the case of Holly v. Met. L. Ins. Co., 105 N. Y. 437-443-444, a portion of the opinion of which we quoted in our brief upon the merits, on page 27 and 28. A premium in insurance is defined to be the consideration paid by the insured to the insurer for carrying the risk of the insurance. The sum which Mr. Banholzer promised by his note to pay defendant on the 16th of May, 1897, answers this definition precisely. An installment or portion of a premium being due on the 16th day of May, 1897, from Mr. Banholzer to the defendant, the law of 1892 of the state of New York, chapter 690, section 92, stepped in and declared that for non-payment of that installment or portion of premium, the defendant company should not under any circumstances or conditions whatsoever have the right to declare the policy of Mr. Banholzer forfeited and lapsed, unless a notice had

been given to Mr. Banholzer not less than fifteen or more than forty-five days prior thereto, stating the amount of such installment or portion of premium becoming due on the 16th of May, the place where it was to be paid, and to whom it was payable, and stating that unless it were paid by or before the day it fell due, the policy and all payments thereon would become forfeited and void. Defendants admitted their failure to do this (Record, fols. 66, 67). As far as this provision of the statute of New York is concerned there is absolutely no ambiguity, uncertainty, indefiniteness or vagueness in the language employed by the legislature. It is unambiguous, clear, and precise, to a degree that could not have been exceeded by using any other language, to the effect that when a portion or installment of a premium required by the terms of a policy of insurance to be paid was coming due, the insurer could, under no circumstances or conditions, declare such policy forfeited or lapsed by reason of non-payment when due of such installment or portion of premium unless the company gave the insured the notice prescribed by the law in the manner therein directed. This being the case, the law applicable to the relations existing between Mr. Banholzer and the defendant in this respect, being positively unambiguous, plain, precise, clear and free from all reasonable doubt, and defendant having admitted failure to comply with the law, there was no occasion for the lower court to construe that law, nor was it permissible under any sound rule of law for it to attempt to distort

and twist and tamper with the statute by use of any technical rules of construction. What is plain, clear, precise, unambiguous and free from doubt in a public statute, does not require nor permit of construction on the part of any courts, and any attempt at construction under such circumstances is an invasion by the court of the unalienable prerogatives of the legislature. This proposition we believe to be fully borne out by the authorities and we deem it not out of place, although no rule is so well known and so firmly established, to quote from a few of them, which in the short time allowed us to examine into this matter we have had time to look into, and have cited above.

In the case of Johnson v. H. R. R. Co., the court says:

"It is not for the court, acting upon conjecture "and surmising what may have been the intent of "the legislature, to interpolate exceptions in the "statute, thus in effect avoiding and nullifying the "express declaration of the legislature. * * * "So read, the statute is unambiguous and in no "need of interpretation. The language of the act "being explicit, and the words free from ambiguity "and doubt, capable of being read and understood, "expressing plainly and distinctly the sense of the "framers of the act, there is no occasion to resort "to other means of interpretation. Where the lan-"guage is definite and has a precise meaning, it "must be presumed to declare the intent of the "legislature, and it is not allowable to go else-"where in search of conjecture to restrict or extend "the meaning. * * * The provision here is "clear and precise, and courts cannot go beyond or "outside of it under pretext of interpretation to "cure any supposed blunder of the legislature."

In McCluskey v. Cromwell, the court in its opinion quotes with approval the following statements by Judge Johnson in Newell v. People, 7 N. Y. 97:

"Whether we are considering an agreement be-
"tween parties, a statute, or a constitution, with
"a view to its interpretation the thing we are to
"seek is, the thought which it expresses. To as-
"certain this, the first resort, in all cases, is to the
"natural signification of the words employed, in
"the order and grammatical arrangement in which
"the framers of the instrument have placed them.
"If thus regarded, the words embody a definite
"meaning, which involves no absurdity and no con-
"tradiction between different parts of the same
"writing,then,that meaning, apparent upon the face
"of the instrument, is the one which alone we are
"at liberty to say was intended to be conveyed. In
"such a case, there is no room for construction.
"That which the words declare, is the meaning of
"the instrument; and neither courts nor legisla-
"tures have the right to add to, or take away from,
"that meaning."

In Ruggles v. Illinois, the court decides that the words of the statute under consideration there were plain and interpreted themselves and quote Vattel's first general maxim of interpretation as follows:

"It is not allowable to interpret what has no
"need of interpretation. * * * When a deed
"is worded in clear and precise terms—when its
"meaning is evident and leads to no absurd con-
"clusion—there can be no reason for refusing to
"admit the meaning which such deed naturally
"presents. To go elsewhere in search of conjec-
"tures, in order to restrict or extend it, is but to
"elude it."

In the case of Doe v. Considine, this court having

quoted a clause of a statute under consideration, said:

"The language of this clause is plain and un-
"ambiguous. There is nothing in the context,
"rightly considered, which qualifies or effects it.
"There is, we think, no room for construction. * *
"Were we to adopt the construction claimed by
"the plaintiff's counsel, instead of adjudicating we
"should legislate. That we have no power to do.
"Our function is to execute the law, not to make
"it."

In McPherson v. Black, this court had under consideration the constitution of the State of Michigan, and upon this point said:

"The framers of the Constitution employed
"words in their natural sense; and where they are
"plain and clear, resort to collateral aids of inter-
"pretation is unnecessary and cannot be indulged
"in to narrow or enlarge the text."

It must be concluded, therefore, that to suppose that this case called for the construction of the statute of New York by the courts of the State of Minnesota is completely to misconceive the situation. It was a case for the application of the New York law and the courts of the State of Minnesota refused to apply it, thereby denying to the law any force, effect, credit or validity whatever in the case at bar. This court, therefore, has jurisdiction of the cause and in assuming such jurisdiction, it in no manner comes in conflict with the doctrine announced in the case of Glenn v. Garth, concerning which we have more to say infra.

It would be extremely unfair to tax us at this time with having made use in our brief on the

merits of the word construction with reference to this public act of the state of New York, for when we there used the word we did not have in mind the question now being considered.

II.

THE PUBLIC ACT OF THE STATE OF NEW YORK AND THE CREDIT AND EFFECT THAT THE SAME HAD BY LAW AND USAGE IN THE COURTS OF THAT STATE WAS PROVED AS A MATTER OF FACT IN THE LOWER COURT.

Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S. 622-623.
Glenn v. Garth, 147 U. S. 360-369.
Lloyd v. Matthews, 155 U. S. 222-227-228.

The law with reference to this matter is set out in these cases with great clearness and in substance is this:

That when in an action in the state court a party rests upon some right or title derived from or under a statute of another state, such statute and the effect that the same has by law or usage in the state where enacted, must be proved as a matter of fact whenever such proof is necessary to enable the court to ascertain what that effect is, in order to raise a federal question and bring the case within the jurisdiction of this court. That this is a fair expression of the rule is, we think, apparent from the following excerpts from the opinions of the court in those cases.

Chicago & Alton Ry. Co. v. Wiggins Ferry Co.:

"Whenever it becomes necessary under this re-
"quirement of the constitution for a court of one
"state, in order to give faith and credit to a public
"act of another state, to ascertain what effect it
"has in that state, the law of that state must be
"proved as a fact. No court of a state is charged
"with knowledge of the laws of another state; but
"such laws are in that court matters of fact, which,
"like other facts, must be proved before they can
"be acted upon. This court, and the other courts
"of the United States, when exercising their ori-
"ginal jurisdiction, take notice, without proof, of
"the laws of the several states of the United
"States; but in this court, when acting under its
"appelate jurisdiction, whatever was matter of fact
"in the court whose judgment or decree is under
"review, is matter of fact here."

Lloyd v. Matthews:

"Whenever a court of one state is required to as-
"certain what effect a public act of another state
"has in that state, the law of such other state must
"be proved as a fact."

Glen v. Garth:

"This record may be searched in vain for any
"proof that, as matter of fact, the public acts of
"Virginia had, by law or usage in Virginia, any
"other effect than was given them in New York."

It will be observed that under this rule it is necessary to make special proof of the effect which the public act of the sister state has by law or usage in that state, when, and only when, such proof is necessary to ascertain what that effect is. This is in accordance with sound reasoning and was stated by this court expressly in the opinion in Chicago & Alton Ry Co. v. Wiggins Ferry Co.,

which we have quoted above. The obverse of the proposition is, that when it is not necessary to prove the effect that a statute of a sister states has by law and usage in that state in order to enable the court to ascertain what that effect is, such proof is not required. The case at bar comes directly under this rule and is evidently such a case as the rule was intended to apply to. As we have shown, and as appears indeed from the mere perusal of the statute itself, the provisions and meaning of the statute are unambiguous, clear, certain and precise to a degree that could not have been exceeded by the use of any other language than that employed by the legislature. It was not necessary therefore to present to the lower courts any other evidence than the law of New York itself to show what effect the law had in New York by law or usage in order to enable the lower court to ascertain what effect that was. The effect of the statute was apparent on its face and there was no necessity of going further. A statute is presumed to be valid and to mean what it says and to have the effect which it discloses in plain, unambiguous, precise and certain terms. This proposition would hardly seem to require the citation of authorities in its support, but we submit the following quotation from the opinion of this court delivered by Mr. Justice Harlan in the case of Powell v. Pennsylvania, 127 U. S. 678-684:

"'Every possible presumption,' Chief Justice "Waite said, speaking for the court in the Sinking "Fund Cases, 99 U. S. 700, 718, 'is in favor of the

"'validity of a statute, and this continues until the "'contrary is shown beyond a rational doubt. One "'branch of the government cannot encroach on "'the domain of another without danger. The "'safety of our institutions depends in no small de-"'gree on a strict observance of this salutary rule'."

In Johnson v. H R. R. Co., the court says:

"Where the language is definite and has a pre-"cise meaning, it must be presumed to declare the "intent of the legislature."

In Kock v. Bridges, 45 Miss. 259, the court said:

"No principle is more firmly established, or "rests on more secure foundations, than the rule "which declares when a law is plain and unambi-"guous, whether it be expressed in general or lim-"ited terms, that the legislature shall be intended "to mean what they have plainly expressed, and, "consequently, no room is left for construction."

We may say, therefore, that the statute of New York must have been by the lower courts presumed to be valid and to mean what it says in unambiguous, certain, clear and precise words and that this presumption continued until the contrary were shown "beyond a rational doubt." This presumption was a matter of evidence in the court below, and if the defendants desire to maintain the monstruous contention that the courts of the state of New York had encroached upon the domain of the legislature of that state and determined that the law in question did not mean and could not have the effect which its words conveyed, that was a matter of defense and it rested upon the defendant to prove it "beyond a rational doubt" in order to overcome the legal presumption to the contrary.

The defendants were equal to this as they are to any other emergency that will enable them to defeat the just claim of this plaintiff. They did attempt to do this by bringing to the notice of the court below the case of Conway v. Insurance Co., 149 N. Y. 79. That case fails entirely to support their position, as is shown by our discussion of the case in our brief upon the merits and as was admitted by the lower court in its opinion on rehearing. We will not repeat that discussion here, for, in any event, it is matter for consideration upon the merits of this case and is irrelevant to the question presented upon this motion. It should be remembered that the public act of the state of New York in question was admitted by defendants in error to be genuine and authentic as set out in the complaint of the plaintiff. Record, folio 39.

The act was therefore before the court as a matter of admitted fact and no other evidence or proof thereof could be required or expected. We are the more convinced that our position with reference to this matter is correct for the reason that any other view leads to absurd and ridiculous consequences.

Suppose our position to be incorrect. Every case of the kind must arise under one or other of two conditions. Either the statute of the other state will have been under consideration by the courts of that state in some case or cases, or else it will not have been under consideration by the courts of that state in any case. Take the first alternative and we may say (since the case is one where the provisions of the statute are unambigu-

ous, clear and precise), a court must either have applied the statute or have found it to be invalid and hence refused to apply it. Now it certainly would not be required on the part of the litigant claiming a right under that statute in another state to introduce in evidence cases determined in the state where the statute was enacted which simply applied to the statute, for such proof would be wholly superfluous for the purpose of showing the effect of the statute to be what its provisions declare in unambiguous, clear and precise terms. The court will presume this from the statute itself. On the other hand it would not be required of the litigant to introduce in evidence decisions of the courts of the state where the statute was enacted, which had declared the statute invalid for that would be a matter of defense. Take the second alternative where we suppose that the statute has never in any case been before any court of the state where enacted for its consideration. How would it be possible to introduce any competent and proper evidence of the effect of the statute outside of the statute itself. Such evidence could take but two forms; one would be the evidence of a man learned in the law of the state where the statute was enacted, and what court would listen to the testimony of such a witness to the effect that the statute means what it says. Any court under such circumstances would certainly feel that it was being trifled with. In any event such testimony would be utterly superfluous, since there is a legal presumption in every case that a statute is valid and

means what it says. The other form would be to introduce in evidence all the decisions of all the courts of the state where the statute was enacted which had been decided since its enactment, all of which decisions the court would have to examine on a foolish quest, viz: to learn if the courts of the sister state had ever announced that the statute meant what its words declared. We are right, therefore, in concluding that the statute of the state of New York under which plaintiff claimed in the case at bar was proved in the lower courts as a matter of fact to the fullest extent that was possible, reasonable or necessary.

III.

WITHOUT REFERENCE TO WHETHER PLAINTIFF WAS RIGHT OR WRONG IN HER CONTENTION THAT BY REASON OF DEFENDANT'S ADMITTED FAILURE TO COMPLY WITH THE PROVISIONS OF THE PUBLIC ACT OF THE STATE OF NEW YORK, THE POLICY OF INSURANCE SUED ON COULD NOT HAVE BEEN FORFEITED OR LAPSED, THE MERE FACT THAT SHE CLAIMED UNDER THE PUBLIC ACT OF THE STATE OF NEW YORK AND THAT HER CLAIM WAS OVERRULED IN THE LOWER COURT GIVES THIS COURT JURISDICTION.

Green v. Van Buskirk, 5 Wall. 307 and 7 Wall. 139.

Crapo v. Kelly, 16 Wall. 610.

Thorman v. Frame, decided February 26th, 1900.

Hanley v. Donoghue, 116 U. S. 1.

Hancock National Bank v. Farnum; decided March 12th, 1900.

In the case of Green v. Van Buskirk, the facts are reported as follows:

"With this provision of the Constitution and "this law in force, Bates being the owner of certain "iron safes at Chicago, in the State of Illinois, on "the 3rd day of November, 1857, executed and del-"ivered, in the State of New York, to Van Buskirk "and others, a chattel mortgage of them. On the "5th day of the same month Green caused to be "levied on the same safes a writ of attachment, "sued by him out of the proper court in Illinois, "against the property of Bates. The attachment "suit proceeded to judgment, and the safes were "sold in satisfaction of Green's debt. Van Bus-"kirk, Green and Bates were all citizens of New "ork. Green's attachment was levied on the safes "as the property of Bates, before the possession was "delivered to Van Buskirk, and before the mort-"gage from Bates to him was recorded, and before "notice of its evistence.

"Van Buskirk afterwards sued Green, in the "New York courts, for the value of the safes thus "sold under his attachment, and Green pleaded "the proceding in the court of Illinois in bar of the "action. In this suit thus brought by him in the "New York courts, Van Buskirk obtained judg-"ment, and the judgment was affirmed in the high-"est court of the State of New York. From this "affirmance Green took a writ of error to this "court, assuming the case to fall within the twen-"ty-fifth section of the Judiciary Act, which gives "such writ in any case wherein is drawn in ques-"tion a clause of the Constitution of the United "States, and the decision is against the title, right, "or privilege specially set up. His assumption "was that the faith and credit, which the judicial "proceedings in the courts of the State of Illinois "had by law and usage in that state, were denied "to them by the decision of the courts of New York, "and that in such denial, those courts decided "against a right claimed by him under the above-"mentioned Section 1, Article IV. of the Constitu-

"tion, and the act of congress of May 26th, 1790, on "the subject of it."

Mr. Justice Miller in delivering the opinion of the court said:

"And notwithstanding the inverted manner in "which the court has stated its legal conclusions, "it seems clear that it did pass upon the effect of "the judicial procedings in Illinois upon the title "of the property in contest. * * *

"We do not here decide that the procedings in "the State of Illinois have there the effect which "plaintiff claims for them; because that must re- "main to be decided after argument on the merits "of the case. But we hold that the effect which "these procedings have there, by the law and usage "of that state, was a question necessarily decided "by the New York courts, and that it was decided "against the claim set up by plaintiff in error un- "der the constitutional provision and statute re- "ferred to, and that the case is therefore properly "here for review."

In the same case, after hearing upon the merits, Mr. Justice Davis in delivering the opinion of the court, 7 Wall., stated:

"The question raised on the motion to dismiss "was, whether the supreme court of New York, in "this case, had decided against a right which "Green claimed under the Constitution and an act "of congress. If it had, then this court had juris- "diction to entertain the writ of error, otherwise "not.

"It was insisted on the one side, and denied on "the other, that the faith and credit which the "judicial proceedings in the courts of the State of "Illinois had by law and usage in that state, were "denied to them by the supreme court of New York, "in the decision which was rendered.

"Whether this was so or not, could only be prop- "erly considered when the case came to be heard

"on its merits; but this court, in denial of the "motion to dismiss, held that the supreme court of "New York necessarily decided what effect the at- "tachment proceedings in Illinois had by the law "and usage in that state; and as it decided against "the effect which Green claimed for them, this "court had jurisdiction, under the clause of the "Constitution which declares 'that full faith and " 'credit shall be given in each state to the public " 'acts, records and judicial proceedings in every " 'other state,' and the act of congress of 1790, "which gives to those proceedings the same faith "and credit in other states, that they have in the "state in which they were rendered.

"This decision, supported as it was by reason "and authority, left for consideration, on the hear- "ing of the case, the inquiry, whether the supreme "court of New York did give to the attachment "proceedings in Illinois, the same effect they would "have recived in the courts of that state."

The facts in the case of Crapo v. Kelly were as follows: A. of Massachusetts, owning a ship then on the high seas bound for the port of New York, but registered in Massachusetts, applied to the insolvent court of Massachusetts for the benefit of the insolvent laws o fthe state, and under the statutes of the state the judge of the insolvent court executed and delivered to the assignee an assignment of all the debtor's property, the effect of which, under the statute, was to convey to the assignee all the debtor's property "which he could have lawfully sold, assigned, or conveyed." The debtor himself executed no transfers. After this, the ship being still on the high seas, B., of New York, sued A. in New York for a money debt, and in accordance with the laws of New York respecting non-resident debtors issued

an attachment against his property. The ship arrived in port a few days afterwards and was attached by the sheriff at B's suit. On a suit in New York betwen the assignee in insolvency appointed by the Massachusetts court and the sheriff of New York, to determine with whom was the prior right, whether the Massachusetts assignee in insolvency or the New York attaching creditor, it was held by the highest court of New York that the prior right was with the New York attaching creditor. The case was brought to this court on a writ of error to the Supreme Court of New York, and this court held upon the question of its jurisdiction to review the decision of the New York court, that the New York court necessarily decided what effect the insolvent proceedings in Massachusetts had by law and usage in that state, and that as it decided against the effect which the defendant set up for them, this court had jurisdiction to review the judgment of the New York court. Mr. W. M. Evarts appeared in support of the motion to dismiss the writ of error. Mr. Justice Hunt delivered the opinion of the court and after stating as a precedent the facts and decision of the court in the case of Green v. Van Buskirk, stated as follows:

"Without reference to whether he was right or "wrong, the fact that Green claimed under the "judicial record of Illinois, and that his claim was "overruled, was held to give this court jurisdiction. "Without reference to whether Crapo was right or "wrong, whether the question was res integra, or "res adjudicata, the fact that he claimed title un- "der the Massachusetts record, and that his claim "was overruled, gives the court jurisdiction of the

"present case. The authority of Green v. Van Bus-
"kirk in 5th Wallace, is clear to that point. * * *

"Whether the Supreme Court of New York held
"correctly or otherwise was important when the
"case came before this court for a final hearing,
"but the fact simply that it had decided against
"Green's claim of the effect of the record gave juris-
"diction.

"We think the jurisdiction of the court now to
"hear and decide the case is sufficiently clear."

In the case of Hancock National Bank v. Farnum, decided March 12th, ultimo., the plaintiff claimed, in the courts of Rhode Island under a judgment recovered in the State of Kansas. This court by Mr. Justice Brewer in that case, stated as follows:

"The plaintiff's contention that these Federal
"provisions require a decision different from that
"made by the state court was distinctly presented
"and ruled against. The jurisdiction, therefore, of
"this court, is clear It may examine and inquire
"whether any right secured by these provisions
"was denied by the state court."

The case of Crapo v. Kelly, is cited in that opinion. The public acts of a state are by Section 1 of Article IV. of the Constitution, and by Sections 905 of the Revised Statutes, of the United States, placed in the same class with the records and judicial procedings of a state, and when it comes to the jurisdiction of this court to review a decision of the state court, the rule in that connection with reference to the public acts of a state must be the same as the rule in relation to its records and judicial proceedings, that is, the same as the rule stated

in Crapo v. Kelly and the other cases just cited. Accordingly, we conclude under the authority of those cases, that without reference to whether Louisa Banholzer, the plaintiff in error, was right or wrong in her contention, the mere fact that she claimed a right or immunity under a public act of the state of New York, and that her claim was overruled, gives this court jurisdiction of the case.

It was not necessary for plaintiff to make any specific reference to the Constitution or Statutes of the United States, since she set up in her complaint the public act of New York and this was equivalent to the assertion of a right under a statute of the United States.

Du Passeur v. Rochereau, 21 Wall. 134.

Ry. Co. v. Trust Co., 172 U. S. 493-509.

Crescent Co. v. Butchers' Union, 120 U. S. 144-146.

Hancock National Bank v. Farnum, supra.

In the last cited case, Mr. Justice Brewer who delivered the opinion of the court, quoted the following from Crescent Co. v. Butchers' Union:

"It may be conceded, then, that the judgments "and decrees of the circuit court of the United "States, sitting in a particular state, in the courts "of that state, are to be accorded such effect, and "such effect only, as would be accorded in similar "circumstances to the judgments and decrees of a "state tribunal of equal authority."

V.

BUT PLAINTIFF WENT FARTHER THAN WAS NECESSARY, ACCORDING TO THE RULE STATED IN GREEN V. VAN BUSKIRK, AND CRAPO V. KELLY, WHEN SHE SPECIFICALLY CLAIMED IN THE LOWER COURT A "RIGHT, TITLE, PRIVILEGE OR IMMUNITY" UNDER THE CONSTITUTION OF THE UNITED STATES, AND IF THIS HAD BEEN NECESSARY IT WAS DONE IN DUE TIME.

Printed record, folios 12, 13.

Loeber v. Schroeder, 149 U. S. 580.

Capital Bank v. National Bank, 172 U. S. 426.

On her appeal to the Supreme Court of Minnesota from the judgment of the district court of the County of Ramsey, plaintiff specifically assigned as error, that the judgment and holdings of said district court denied the provisions of the public act of New York, set out in her complaint, the full faith and credit secured to them and claimed for them by her by virtue of Section 1 of Article IV. of the Constitution of the United States. The Supreme Court of Minnesota, one Justice dissenting, upon the appeal, affirmed the judgment of the district court, and decided against the "title, right, privilege or immunity specially set up and claimed" by plaintiff under the Constitution of the United States.

All that the provisions of Section 709 of the Revised Statutes of the United States require to make a judgment of a state court reviewable here, is that

the "title, right, privilegé or immunity" should be "specially set up or claimed" *"before final judgment or decree in the highest court of a state,"* and that the decision should be against the "title, right, privilege or immunity so specially set up or claimed." In this case the public act of New York was set out in the complaint, and plaintiff claimed its effect to be such as to relieve her from a forfeiture of the policy The district court necessarily decided what effect was to be given to that public act. On appeal to the Supreme Court of Minnesota from the judgment of the district court, plaintiff specifically assigned as error that the district court in its holdings and judment denied to the public act of New York that full faith and credit secured to it by the Constitution of the United States. The right was thus specially set up or claimed more specially than was considered necessary in Green v. Van Buskirk and Crapo v. Kelly, and this was done prior to judgment in the highest court of the state, which is all the statute requires in any case.

In the case of Capital Bank v. National Bank, the general rule that a right under a statute of the United States is claimed in time when claimed before judgment in the highest court in the state is clearly enunciated in the following language of the opinion:

"The general rule was not questioned that if the "alleged right was not claimed before judgment in "the highest court of the state it could not be as-"serted in this court."

Our conclusion then is: First. That this was

a case for the application by the lower court of the public act of the State of New York and not for its construction, since its provisions are unambiguous, clear and precise to the effect that before an insurance company can declare a policy forfeited or lapsed by reason of the non-payment, when due, of any premium or any installment or portion of a premium required by the policy to be paid, it must give the notice therein prescribed within the time therein directed. Second. That such public act and the effect of its provisions relating to notice were duly proved in the lower court as matters of fact. Third. That the mere fact that the plaintiff claimed under a public act of the State of New York gives this court jurisdiction without reference to whether she was right or wrong in her contention. Fourth. That in the case at bar plaintiff went further than was necessary to establish the jurisdiction of this court when she specifically claimed before final judgment in the lower court a right, title, privilege or immunity under Section 1 of Article IV. of the Constitution and Section 905 of the Revised Statutes of the United States. Fifth. The jurisdiction of the court is clear.

Respectfully submitted,

CHRISTOPHER DILLON O'BRIEN,

Plaintiff's Attorney.

Dated April 17th, 1900.